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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 SAN DIEGO MINUTEMEN, an  
12 unincorporated association,

Plaintiff,

13 vs.

14 CALIFORNIA BUSINESS,  
15 TRANSPORTATION AND HOUSING  
16 AGENCY'S DEPARTMENT OF  
17 TRANSPORTATION; DALE BONNER, in  
18 his official capacity as Agency Director of  
19 the California Business, Transportation and  
20 Housing Agency; WILL KEMPTON,  
individually and in his official capacity as  
Caltrans Director; PEDRO ORSO-  
DELGADO, individually and in his official  
capacity as Caltrans District Director; and  
DOES 1 through 50,

21 Defendants.

CASE NO. 08CV210 WQH (RBB)

ORDER (1) GRANTING IN PART, AND  
DENYING IN PART, DEFENDANTS'  
MOTION TO DISMISS, AND (2)  
GRANTING PLAINTIFF'S MOTION  
FOR A PRELIMINARY INJUNCTION

22 HAYES, Judge:

23 Pending before the Court are Defendants' motion to dismiss (Doc. # 19) and Plaintiff's motion  
24 for a preliminary injunction (Doc. # 13). The Court heard oral argument on these matters on Friday,  
25 May 9, 2008.

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## PROCEDURAL BACKGROUND

On February 4, 2008, Plaintiff San Diego Minutemen filed a Complaint against Defendants California Business, Transportation and Housing Agency's Department of Transportation (Caltrans); Dale Bonner, Agency Director of the California Business, Transportation and Housing Agency; Will Kempton, Caltrans Director; and Pedro Orso-Delgado, Caltrans District Director. (Doc. # 1). The Complaint alleges that Defendants violated Plaintiff's constitutional rights to free speech, free expression, equal protection, and due process in revoking Plaintiff's Adopt-A-Highway Program permit and removing Plaintiff's Adopt-A-Highway courtesy signs from their location along Interstate 5 at San Onofre, California. (Doc. # 1). In addition, the Complaint asserts claims for damages pursuant to 42 U.S.C. §§ 1983 and 1988. (Doc. # 1).

On February 4, 2008, Plaintiff filed a request for a temporary restraining order. (Doc. # 2). On February 7, 2008, the Court denied the request for a temporary restraining order. (Doc. # 6).

On February 25, 2008, Plaintiff filed the pending motion for a preliminary injunction. (Doc. # 13). On February 27, 2008, Defendants' filed the pending motion to dismiss the Complaint. (Doc. # 19).

## DISCUSSION

### I. Defendants' Motion to Dismiss (Doc. # 19)

#### A. Allegations of the Complaint

Plaintiff San Diego Minutemen is an unincorporated association operating in San Diego, California. *Complaint (Compl.)*, ¶ 1. Plaintiff's organization "promotes adherence to both California and federal immigration laws in a peaceful, non-violent manner," and its mission statement is:

To demand the maximum border security and immigration enforcement both locally and at the national level. We oppose illegal immigration in all parts of San Diego County with our activism. We assist and support the U.S. Border Patrol in securing the U.S.-Mexican border from terrorists, gang members, criminals, drugs, and illegal aliens entering the United States. We also assist ICE (Immigration & Customs Enforcement) and local law enforcement in exposing law breaking employers and helping to return illegal aliens to their country of legal residence. We act on behalf of and in accord with the United States Constitution and the Bill of Rights.

*Compl.*, ¶ 7.

Defendant Caltrans is the California agency or department in charge of highways and the California Adopt-A-Highway (AAH) Program. *Compl.*, ¶ 4. Defendant Dale Bonner is Director of

1 the California Business, Transportation, and Housing Agency, the state agency which oversees  
2 Caltrans. *Compl.*, ¶ 5. Defendant Will Kempton is the Director of Caltrans. *Compl.*, ¶ 6. Defendant  
3 Pedro Orso-Delgado is the District Director of Caltrans for the area which is the subject of Plaintiff's  
4 Complaint. *Compl.*, ¶ 6.

5 On or about September 18, 2007, Plaintiff applied for an AAH encroachment permit. *Compl.*,  
6 ¶ 8. On November 19, 2007, Defendant Caltrans "accepted" Plaintiff into the AAH Program. *Compl.*,  
7 ¶ 9 & Ex. 1. On November 21, 2007, Defendant Caltrans issued Plaintiff a "site specific" AAH  
8 encroachment permit for a portion of Interstate 5 near San Onofre, California, designated as AAH  
9 Program segment "11-SD-005 / 66.3-68.3 N/B." *Compl.*, ¶ 10 & Ex. 2. Thereafter, Defendants  
10 "erected signs on either side of the San Onofre, Immigration Check Point on the northbound side of  
11 Interstate 5," which read "San Diego Minutemen." *Compl.*, ¶ 11 & Ex. 3.

12 In January of 2008, members of Plaintiff's organization picked up trash at their AAH Program  
13 "assigned area." *Compl.*, ¶ 12. "While cleaning up their area," members of Plaintiff's organization  
14 wore "Caltrans approved hard hats and safety vests," and there was no "violence," "interaction with  
15 motorists," or use of "signs" or "placards." *Compl.*, ¶ 12.

16 On January 28, 2008, Plaintiff received a letter from Defendant Orso-Delgado notifying  
17 Plaintiff that "Caltrans was terminating and revoking" Plaintiff's encroachment permit because the  
18 permit "raised questions" about safety. *Compl.*, ¶ 13 & Ex. 5. The letter stated that Plaintiff's AAH  
19 Program courtesy sign would "be removed." *Compl.*, ¶ 13 & Ex. 5. With respect to safety and the  
20 reasons for revocation, the letter noted that,

21 The location of your existing Adopt-A-Highway (AAH) permit has raised questions  
22 regarding public safety due to the proximity of your assigned highway segment to a  
23 U.S. Border Patrol facility that is co-located with the California Highway Patrol (CHP)  
24 San Onofre Inspection facility. Your group has also indicated concerns regarding  
possible vandalism to the courtesy sign displaying your participation in the AAH  
Program and the release of information relative to the days you will perform the  
required clean up.

25 *Compl.*, Ex. 5. The letter further noted that Plaintiff's participation in the AAH Program at the  
26 location in San Onofre, posed "a significant risk of disruption to the operation of the State highway,  
27 as well as public safety concerns for both the traveling public and the participants in the AAH  
28 Program." *Compl.*, Ex. 5.

1 In addition to safety concerns, the revocation letter of January 28, 2008, stated that Caltrans  
 2 was “currently examining allegations of violent behavior and/or advocacy of violence by [Plaintiff’s]  
 3 group.” *Compl.*, Ex. 5. The letter informed Plaintiff that,

4 Under the AAH Program eligibility criteria, entities that advocate violence, violation  
 5 of the law, or discrimination based upon race, religion, color, national origin, ancestry,  
 6 physical handicap, medical condition, marital status, age, sex, or sexual orientation  
 may not participate in the Program.

7 *Compl.*, Ex. 5.

8 On or after January 28, 2008, Defendants removed Plaintiff’s AAH courtesy sign from its  
 9 location along Interstate 5. *Compl.*, ¶ 15(3) & Ex. 5.

10 Plaintiff alleges that Defendants terminated Plaintiff’s site-specific AAH Program permit  
 11 because “three members of the California Legislature” placed pressure on Defendants to terminate  
 12 Plaintiff’s permit. *Compl.*, ¶ 14. Plaintiff alleges that “the termination of [Plaintiff’s] Adopt-A-  
 13 Highway sign and requisite privileges and obligations” violated Plaintiff’s “First Amendment rights”  
 14 because the termination was the result of “content and viewpoint discrimination by Defendants.”  
 15 *Compl.*, ¶ 15(1). “Plaintiff contends that the actions of Defendants . . . in terminating Plaintiff’s site  
 16 specific Adopt-A-Highway location were done arbitrarily, capriciously and based upon the unfettered  
 17 discretion given to the Defendants . . . in violation of Plaintiff’s constitutional right to free speech and  
 18 equal protection under the laws.” *Compl.*, ¶ 15(2).

19 Plaintiff alleges that Defendants terminated Plaintiff’s site-specific permit and removed  
 20 Plaintiff’s sign without following Defendants’ “own policies and procedures,” and without allowing  
 21 Plaintiff a hearing or an opportunity to “present evidence” in violation of Plaintiff’s rights to due  
 22 process. *Compl.*, ¶¶ 15(3), 16.

### 23 **B. Standard of Review**

24 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings. *De La*  
 25 *Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). A complaint may be dismissed for failure to state  
 26 a claim under Rule 12(b)(6) where the factual allegations do not raise the “right to relief above the  
 27 speculative level.” *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Conversely, a complaint  
 28 may not be dismissed for failure to state a claim where the allegations plausibly show “that the pleader  
 is entitled to relief.” *Id.* (citing FED R. CIV. P. 8(a)(2)). In ruling on a motion to dismiss pursuant to

1 Rule 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and  
2 further, must accept as true all material allegations in the complaint, as well as any reasonable  
3 inferences to be drawn therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). In  
4 considering a Rule 12(b)(6) dismissal, a court may not look beyond the complaint. *Moore v. Costa*  
5 *Mesa*, 886 F.2d 260, 262 (9th Cir. 1989).

### 6 C. Analysis

7 Defendants contend that the Complaint should be dismissed because it fails to state a  
8 cognizable claim for relief and is not ripe for review. Specifically, Defendants contend that Plaintiff  
9 has not alleged nor suffered harm, and further, that the facts alleged do not violate Plaintiff's  
10 constitutional rights to free speech, equal protection, or due process. Defendants contend that  
11 Plaintiff's claims pursuant to 42 U.S.C. § 1983 must be dismissed because Plaintiff has not stated a  
12 claim for violation of a constitutional right.

13 Defendant Caltrans contends that it should be dismissed because it is entitled to Eleventh  
14 Amendment sovereign immunity. Defendants Kempton and Orso-Delgado contend that they should  
15 be dismissed in their individual capacities because they are entitled to qualified immunity. Defendants  
16 Kempton, Bonner, and Orso-Delgado contend that they should be dismissed in their official capacities  
17 because they are in essence the State, and are therefore entitled to Eleventh Amendment immunity.

18 Plaintiff contends that it has properly asserted claims for violation of its constitutional rights,  
19 and notes that this action is ripe because Plaintiff suffered harm as a result of those constitutional  
20 violations. Plaintiff contends that the Eleventh Amendment should not bar its claims against Caltrans  
21 because there is federal question jurisdiction and not simply diversity jurisdiction. Assuming Eleventh  
22 Amendment immunity applies, Plaintiff contends that Defendants Bonner, Kempton, and Orso-  
23 Delgado are not immune from suit for declaratory or injunctive relief.

#### 24 1. Eleventh Amendment Immunity

25 The Eleventh Amendment to the United States Constitution provides,

26 The Judicial power of the United States shall not be construed to extend to any suit in  
27 law or equity, commenced or prosecuted against one of the United States by Citizens  
of another State, or by Citizens or Subjects of any Foreign State.

28 "[F]or over a century," the United States Supreme Court has interpreted the Eleventh Amendment as

precluding jurisdiction in federal courts “over suits against nonconsenting States.” *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). The Eleventh Amendment “enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary’s subject-matter jurisdiction,” and it shields a State “save where there has been ‘a surrender of this immunity in the plan of the convention.’” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997) (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)). The Eleventh Amendment immunity shields a State from suits brought by the State’s own citizens as well as in suits invoking federal question jurisdiction. *Id.* at 268.<sup>1</sup>

“State immunity extends to state agencies and to state officers, who act on behalf of the state and can therefore assert the state’s sovereign immunity.” *NRDC v. Calif. Dep’t of Transportation*, 96 F.3d 420, 421 (9th Cir. 1996); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003). A State official “sued in his official capacity has the same immunity as the State, and is entitled to Eleventh Amendment immunity.” *Pena v. Gardner*, 976 F.2d 469, 473 (9th Cir. 1992) (citing *Hafer v. Melo*, 502 U.S. 21, 25-26 (1991)). Where a plaintiff seeks prospective injunctive relief against a State official in his official capacity, however, the Eleventh Amendment will not bar the prospective injunctive claim. *Ex parte Young*, 209 U.S. 123, 155-56 (1908); *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645 (2002); *Porter*, 319 F.3d at 491. In addition, the Eleventh Amendment does not bar claims against State officials to the extent those officials are sued in their individual capacities. *Gardner*, 976 F.3d at 473 (citing *Melo*, 502 U.S. at 472-73); *Porter*, 319 F.3d at 491.

Plaintiff’s Complaint asserts claims against Caltrans, a State agency, as well as against Caltrans Director Kempton and Caltrans District Director Orso-Delgado in their official and individual capacities. The Complaint further asserts a claim against California Business, Transportation, and Housing Agency Director Bonner in his official capacity.

After reviewing the case law, the Court concludes that Defendant Caltrans is entitled to Eleventh Amendment immunity because State sovereign immunity extends to State agencies and the State of California has not consented to suit in this case. *See NRDC*, 96 F.3d at 421. In addition, the

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<sup>1</sup> State courts have a “constitutional obligation . . . to uphold federal law,” and the United States Supreme Court has expressed its continued “confidence” in the States’ ability to do so. *Coeur d’Alene Tribe of Idaho*, 521 U.S. at 275.

1 Court concludes that Defendant Caltrans is not a person pursuant to 42 U.S.C. § 1983. *See Will v.*  
 2 *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Accordingly, Defendants motion to dismiss  
 3 Defendant Caltrans is hereby GRANTED.

4 The Court concludes that individual Defendants Bonner, Kempton, and Orso-Delgado are  
 5 entitled to Eleventh Amendment immunity to the extent that they are sued in their official capacities  
 6 for money damages. *See Melo*, 502 U.S. at 28-30 (“State officers sued for damages in their official  
 7 capacity are not ‘persons’ for purposes of the suit because they assume the identity of the government  
 8 that employs them.”); *Gardner*, 976 F.2d at 472. However, because the Complaint includes claims  
 9 against Bonner, Kempton, and Orso-Delgado for prospective injunctive relief, the Court concludes  
 10 that the individual Defendants are not entitled to Eleventh Amendment immunity to the extent that  
 11 they are sued in their official capacities for prospective injunctive relief. *See Verizon Md., Inc.*, 535  
 12 U.S. at 645; *NRDC*, 96 F.3d at 422; *Porter*, 319 F.3d at 491. In addition, the Court concludes that  
 13 Defendants Kempton and Orso-Delgado are not entitled to Eleventh Amendment immunity for claims  
 14 against them in their individual capacities. *See Gardner*, 976 F.3d at 473; *Porter*, 319 F.3d at 491.

## 15 2. Ripeness

16 Defendants contend that this case should be dismissed because it is not ripe for review.  
 17 Specifically, Defendants contends that the case is not ripe because Plaintiff has not suffered or alleged  
 18 injury. Defendants contend that Plaintiff was not harmed when Defendants relocated Plaintiff’s  
 19 assigned AAH Program segment to a stretch of State Highway 52 near Santee, California.<sup>2</sup>

20 Plaintiff contends that this case is ripe for review because Defendants violated Plaintiff’s  
 21 constitutional rights to free speech, equal protection, and due process. Plaintiff contends that  
 22 Defendants actions in removing Plaintiff’s sign without process and in a viewpoint biased manner  
 23 harmed Plaintiff.

24 “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not  
 25 occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300  
 26 (1998) (citing *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 580-81 (1985)).

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27  
 28 <sup>2</sup> The Complaint does not allege that Plaintiff’s permit was reassigned to another location, and  
 there is no allegation or evidence before the Court which indicates that Defendants have erected  
 Plaintiff’s AAH Program courtesy sign at a location along Highway 52.



1 Ripeness requires a court to “‘evaluate both the fitness of the issues for judicial decision and the  
 2 hardship to the parties of withholding court consideration.’” *Texas*, 523 U.S. at 300-301 (citing *Abbott*  
 3 *Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). Where a “fair reading” of the Complaint  
 4 indicates a live controversy and a fully developed factual scenario, a case is considered ripe for  
 5 review. *Porter*, 319 F.3d at 490-91.

6 Courts generally resolve controversies premised on First Amendment violations “where  
 7 speakers are faced with actual restrictions on the content and/or manner of their speech.” *Comcast*  
 8 *v. San Jose*, No. 5:03-cv-02532-RS, 2004 U.S. Dist. LEXIS 26363, \*14-15 (N.D. Cal. Aug. 23, 2004)  
 9 (citing *Porter*, 319 F.3d at 490-91). Here, the Complaint alleges that Defendants violated Plaintiff’s  
 10 constitutional rights to free speech, equal protection, and due process when Defendants revoked  
 11 Plaintiff’s site-specific AAH permit on the basis of Plaintiff’s viewpoint. The Court concludes that  
 12 a fair reading of the Complaint indicates that Plaintiff alleges that Defendants have impermissibly  
 13 restricted Plaintiff’s speech. The Court concludes that a live controversy exists and that resolution  
 14 of this case does not depend upon “contingent future events that may not occur as anticipated, or  
 15 indeed may not occur at all.” *Texas*, 523 U.S. at 300. The Court further concludes that the case is fit  
 16 for judicial review and that Plaintiff could suffer harm if this Court dismisses the suit on ripeness  
 17 grounds. *See Assoc. General Contractors of Calif. v. Coalition for Econ. Equity*, 950 F.2d 1401,  
 18 1412-1413 (9th Cir. 1991) (“[A]n alleged constitutional infringement will often alone constitute  
 19 irreparable harm.”); *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2003) (same).

20 Defendants’ motion to dismiss on grounds of ripeness is DENIED.

### 21 3. Whether the Complaint States Cognizable Claims for Relief

22 Defendants contend that the Complaint does not state cognizable claims for relief.  
 23 Specifically, Defendants contend that the Complaint fails to state a claim for violation of Plaintiff’s  
 24 rights to free speech, free expression, equal protection, and due process as a matter of law. (Doc. #  
 25 30 at 3-8). Plaintiff contends that it has properly stated claims for violation of its constitutional rights  
 26 and for relief under 42 U.S.C. § 1983.

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1 a. First Amendment

2 The first question is whether Plaintiff's participation in Defendants' AAH Program involves  
 3 protected speech or expression. "The First Amendment's prohibition against 'abridging the freedom  
 4 of speech,'" U.S. CONST. amend I, applies not only to verbal expression, but also to symbolic or  
 5 expressive conduct that is "sufficiently imbued with elements of communication." *Robb v.*  
 6 *Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004) (citing *Spence v. Washington*, 418 U.S. 405, 409  
 7 (1974)); see *Long Beach Area Peace Network v. City of Long Beach*, Case No. 05-55083, 2008 U.S.  
 8 App. LEXIS 8027, \*14-17 (9th Cir. April 15, 2008). The United States "Supreme Court has 'rejected  
 9 the view that an apparently limitless variety of conduct can be labeled speech whenever the person  
 10 engaging in the conduct intends thereby to express an idea.'" *Nordyke v. King*, 319 F.3d 1185, 1189  
 11 (9th Cir. 2003) (citing *Texas*, 491 U.S. at 404).

12 Plaintiff's Complaint alleges that Defendants revoked Plaintiff's site-specific AAH Program  
 13 permit in violation of Plaintiff's right to free speech and expression. Plaintiff contends that its  
 14 participation in the AAH Program involved expressive conduct and speech vis-a-vis the AAH  
 15 Program courtesy signs and Plaintiff's actions in picking up trash on the side of Interstate 5.  
 16 Defendants contend that participation in the AAH Program does not involve protected speech on the  
 17 part of an AAH participant. Rather, Defendants contend that the only speech involved in the AAH  
 18 Program is the State's speech in recognizing AAH Program participants on the AAH Program  
 19 courtesy signs.

20 Courts which have evaluated a claim for violation of the right to free speech by a participant  
 21 in an AAH Program have concluded that participation in an AAH program involves protected speech  
 22 on the part of the AAH participant. See *Hungerbeeler*, 370 F.3d at 744 ("Participation in the AAH  
 23 program . . . does entail some degree of private 'speech' protected by the First Amendment."); *Cuffley*  
 24 *v. Mickes*, 44 F.Supp.2d 1023, 1026 (D. Mo. 1999) (same); *Knights of the KKK v. Arkansas St.*  
 25 *Highway and Transp. Dep't*, 807 F. Supp. 1427, 1435-36 (W.D. Ark. 1992) (same). In addition, the  
 26 Court of Appeal for the Eighth Circuit specifically rejected Defendants contention here that the only  
 27 speech involved in a case involving an AAH Program was the speech of the State in installing the  
 28 AAH courtesy signs on the highway in recognition of the AAH Program participant. *Hungerbeeler*,

1 370 F.3d at 744. After reviewing the case law, this Court agrees with those courts which have  
 2 concluded that participation in an AAH Program involves protected speech and/or expression. The  
 3 Court concludes that Plaintiff's participation in the AAH Program is entitled to protections guaranteed  
 4 by the First Amendment.

5 The conclusion that Plaintiff's participation in the AAH Program involves protected speech  
 6 merely begins the inquiry, as "even protected speech is not equally permissible in all places and at all  
 7 times." *Cornelius v. NAACP*, 473 U.S. 788, 799-800 (1985). The Constitution does not require the  
 8 Government to "freely grant access to all who wish to exercise their right to free speech on every type  
 9 of Government property without regard to the nature of the property or to the disruption that might  
 10 be caused by the speaker's activities." *Id.* "The Court employs a forum analysis to evaluate the nature  
 11 of the property and the corresponding permissible government limitations on expressive activity."  
 12 *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 964 (9th Cir. 1999) (citing *Cornelius*, 473 U.S.  
 13 at 800)). "Forum analysis divides government property into three categories: [traditional] public fora,  
 14 designated public fora, and nonpublic fora." *DiLoreto*, 196 F.3d at 964 (citing *Children of the Rosary*  
 15 *v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998)).

16 Because a principal purpose of traditional public fora is the free exchange of ideas,  
 17 speakers can be excluded from a public forum only when the exclusion is necessary  
 18 to serve a compelling state interest and the exclusion is narrowly drawn to achieve that  
 19 interest. Similarly, when the Government has intentionally designated a place or  
 20 means of communication as a public forum speakers cannot be excluded without a  
 21 compelling governmental interest. Access to a nonpublic forum . . . can be restricted  
 22 as long as the restrictions are reasonable and [are] not an effort to suppress expression  
 23 merely because public officials oppose the speaker's view.

24 *Cornelius*, 473 U.S. at 800 (citations and internal quotations omitted).

25 The Complaint alleges that Defendants terminated Plaintiff's site-specific participation in the  
 26 AAH Program because of political pressure, the content of Plaintiff's speech, and the viewpoint of  
 27 Plaintiff's organization. *Compl.*, ¶¶ 14-15. The Court concludes that the First Amendment protects  
 28 Plaintiff's participation in the AAH Program, and further, that the Complaint alleges that Defendants  
 opened Plaintiff's site-specific location as a forum for speech. For the purposes of the motion to  
 dismiss, the Court concludes that it is not necessary to determine the precise nature of the AAH forum,  
 as such a determination involves a fact sensitive inquiry into the government's intent in opening the  
 forum as well as other factors. *See Cornelius*, 473 U.S. at 802 (to determine the nature of a forum,

1 a court must consider the intent of the government, the policy and practice of the government, the  
2 nature of the property, as well as other factors); *DiLoreto*, 196 F.3d at 965-66. However, after  
3 reviewing the Complaint, the Court concludes that the allegations that Defendants revoked Plaintiff's  
4 permit without process and in a viewpoint biased manner plausibly allege a violation of the First  
5 Amendment, and put Defendants on fair notice of the First Amendment claim against them. *See Bell*  
6 *Atlantic*, 127 S. Ct. at 1965 (a claim should not be dismissed where the allegations raise the right to  
7 relief above the speculative level).

8 Defendants' motions to dismiss Plaintiff's First Amendment claim is DENIED.

9 b. Equal Protection

10 The Equal Protection clause of the Fourteenth Amendment provides that "[n]o State shall . .  
11 . deny to any person within its jurisdiction the equal protection of the laws." In this case, Plaintiff  
12 alleges that Defendants terminated Plaintiff's site-specific AAH Program permit "arbitrarily,  
13 capriciously and based upon the unfettered discretion given to the Defendants" in violation of  
14 Plaintiff's right to equal protection. *Compl.*, ¶ 15(2).

15 Defendants contend that Plaintiff's claim for violation of the right to equal protection must be  
16 dismissed because Plaintiff is not a member of a suspect class, cannot articulate a fundamental interest  
17 in the AAH Program at any specific location, and the State has a legitimate interest in protecting the  
18 safety of the traveling public. Plaintiff contends that it has properly stated a claim for violation of its  
19 right to equal protection because it has alleged that Defendants terminated Plaintiff's AAH permit  
20 arbitrarily and in consideration of Plaintiff's viewpoint and position on immigration.

21 As in *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), "the equal  
22 protection claim in this case is closely intertwined with First Amendment interests," since Plaintiff's  
23 participation in the AAH Program involves protected speech and Plaintiff alleges that Defendants are  
24 treating Plaintiff differently because of Plaintiff's viewpoint. Defendants' motion to dismiss seeks  
25 a final determination of Plaintiff's rights to equal protection under the facts of this case, however, the  
26 Court concludes that such a determination is not appropriate on a motion to dismiss. "To survive a  
27 motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy  
28 only the minimal notice pleading requirements of Rule 8(a)(2)," and that rule "requires only that the

1 complaint include ‘a short and plain statement of the claim showing that the pleader is entitled to  
2 relief.’” *Porter*, 319 F.3d at 494. The Court concludes that the Complaint plausibly alleges a violation  
3 of Plaintiff’s right to equal protection, *see Mosley*, 408 U.S. at 95, and puts Defendant on fair notice  
4 of the equal protection claim against it.

5 Defendants’ motion to dismiss Plaintiff’s equal protection claim is DENIED.

6 c. Due Process

7 “The requirements of procedural due process apply only to the deprivation of interests  
8 encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Bd. of Regents v.*  
9 *Roth*, 408 U.S. 564, 569 (1972). “When protected interests are implicated, the right to some kind of  
10 a prior hearing is paramount.” *Id.* at 569-70. “To determine whether due process requirements apply  
11 in the first place,” a court looks to “the nature of the interest at stake,” to determine whether the  
12 “interest is within the Fourteenth Amendment’s protection of liberty and property.” *Id.* at 570-71.

13 “‘Liberty’ and ‘property’ are broad and majestic terms . . . purposely left to gather meaning  
14 from experience.” *Id.* at 571. The United States Supreme Court has “made clear that the property  
15 interests protected by procedural due process extend well beyond actual ownership of real estate,  
16 chattels, or money.” *Id.* at 572. Similarly, the Court “has required due process protection for  
17 deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.” *Id.*  
18 Where a State directly impinges upon interests in “free speech,” the United States Supreme Court “has  
19 on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not  
20 the speech . . . interest is clearly protected under substantive First Amendment standards.” *Id.* at 575  
21 fn. 14.

22 “To state a procedural due process claim, plaintiffs must plead facts that establish: (1) the  
23 deprivation of a constitutionally protected liberty or property interest; and (2) the denial of adequate  
24 procedural protections.” *Good News Emple. Assoc. v. Hicks*, No. C 03-3542 VRW, 2004 U.S. Dist.  
25 LEXIS 30371, \* 52-53 (N.D. Cal. Mar. 16, 2004) (citing *Brewster v. Bd. of Educ. Of Lynwood Unified*  
26 *Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1988)). In this case, Plaintiff alleges that Defendants revoked  
27 Plaintiff’s site-specific AAH Program permit in violation of Plaintiff’s constitutional right to free  
28 speech without allowing Plaintiff a hearing. *Compl.*, ¶ 15(3). Plaintiff further alleges that Defendants

1 terminated Plaintiff's permit pursuant to Defendants' "unfettered discretion," and that Defendants "did  
2 not follow their own policies and procedures in removing plaintiff's sign." *Compl.*, ¶ 15(2)-(3).

3 The Court concludes that Plaintiff has pled sufficient facts so as to plausibly allege a violation  
4 of its right to due process. Not only is the right to be free from unconstitutional restrictions on speech  
5 a liberty interest protected by due process, *see Bd. of Regents*, 408 U.S. at 575 fn. 14, but the  
6 requirements of due process are violated where a law "conditions the free exercise of First  
7 Amendment rights on the 'unbridled discretion' of government officials." *Gaudiya Vaishnava Soc.*  
8 *v. San Francisco*, 952 F.2d 1059, 1065 (1991) (citing *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S.  
9 750, 756-758 (1988)); *Brewster*, 149 F.3d at 983; *Comcast of Calif. v. City of San Jose*, No. 5:03-cv-  
10 02532-RS, 2004 U.S. Dist. LEXIS 26363, \*18-21 (N.D. Cal. Aug. 23, 2004). In addition, the  
11 Complaint plausibly alleges a property interest in the AAH program permit itself, which Plaintiff  
12 alleges Defendants revoked without process or a hearing, and in violation of Defendants' own policies  
13 and procedures.

14 Defendants' motion to dismiss Plaintiff's due process claim is DENIED.

15 d. § 1983 Claims

16 In order to state a claim for violation of 42 U.S.C. § 1983, a Plaintiff must allege "(1) that the  
17 conduct complained of was committed by a person acting under color of state law; and (2) that the  
18 conduct deprived the plaintiff of a constitutional right." *Balistreri v. Pacifica Police Dep't*, 901 F.2d  
19 696, 699 (9th Cir. 1988).

20 The Complaint asserts claims against Defendants Kempton and Orso-Delgado in their  
21 individual capacities for violation of Plaintiff's constitutional rights to free speech, equal protection,  
22 and due process. *Compl.*, ¶¶ 18-20. The Complaint further alleges that Defendants Kempton and  
23 Orso-Delgado acted under color of state law. *Compl.*, ¶¶ 5-6.

24 The Court has previously concluded that the Complaint properly states claims for relief for  
25 violations of Plaintiff's constitutional rights. Accordingly, and because Plaintiff has asserted claims  
26 against Defendants Kempton and Orso-Delgado in their individual capacities for actions taken under  
27 color of State law, the Court concludes that Plaintiff has properly asserted claims pursuant to 42  
28 U.S.C. § 1983. The Court concludes that Defendants' claim of qualified immunity is more

appropriately resolved at summary judgment as opposed to at the motion to dismiss stage of these proceedings. *See Morley v. Walker*, 175 F.3d 756, 761 (9th Cir. 1999).

Defendants' motion to dismiss (Doc. # 19) is GRANTED in part, and DENIED in part as follows. Defendants' motion to dismiss Defendant Caltrans on Eleventh Amendment immunity grounds is GRANTED. Defendants' motion to dismiss claims for damages against Defendants Bonner, Kempton, and Orso-Delgado in their official capacities is GRANTED. In all other respects, Defendants' motion to dismiss (Doc. # 19) is DENIED.

## II. Motion For Preliminary Injunction (Doc. # 19)

### A. Factual Background

Plaintiff San Diego Minutemen is an association whose mission statement is:

To demand the maximum border security and immigration enforcement both locally and at the national level. We oppose illegal immigration in all parts of San Diego County with our activism. We assist and support the U.S. Border Patrol in securing the U.S.-Mexican border from terrorists, gang members, criminals, drugs, and illegal aliens entering the United States. We also assist ICE (Immigration & Customs Enforcement) and local law enforcement in exposing law breaking employers and helping to return illegal aliens to their country of legal residence. We act on behalf of and in accord with the United States Constitution and the Bill of Rights.

*Declaration of Jeff Schwilk (Schwilk Decl.), ¶ 3.*

On September 18, 2007, Plaintiff San Diego Minutemen applied to be part of Caltrans' Adopt-A-Highway Program. *Schwilk Decl.*, Ex. 5. The "Mission and Vision" of the AAH Program is to "[p]artner with California's citizens to provide motorists with clean and beautiful roadsides," and the goals of the Program are to "maximize the number of active adoptions," "improve the Department [of Transportation's] image," and "improve citizens' pride in their communities," among other things. *Adopt-A-Highway Program Guidelines & Coordinator's Handbook* (Doc. # 19-4 at 1-1). The AAH Program is open to "[i]ndividuals, businesses, corporations, and organizations, except for entities that advocate violence, violation of the law, or discrimination based upon race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age, sex, or sexual orientation . . . ." (Doc. # 19-4 at 1-2).

The Adopt-A-Highway Program recognizes participants by erecting courtesy signs on a participant's adopted highway segment. (Doc. # 19-4 at 2-1). With respect to the courtesy signs, the



1 Adopt-Highway Program Guidelines and Coordinators Handbook states that:

2 Although there is advertising value inherent in the recognition panels, they are not  
3 intended to be an advertising medium. Their purpose is to recognize who is providing  
4 the adoption service, not what service they provide, what products they sell, or where  
they are located. The Adopt-A-Highway Program and its courtesy signs are not a  
forum for advertisement or public discourse.

5 (Doc. # 19-4 at 2-1) (emphasis in original).

6 On or around November 19, 2007, Caltrans admitted Plaintiff into the AAH Program, and  
7 awarded Plaintiff an AAH encroachment permit. *Schwilk Decl.*, ¶¶ 4-5. The encroachment permit  
8 identified Plaintiff's litter-removal area as "11-SD-005 PM 66.3-68.3 N/B," which corresponds to an  
9 area along Interstate 5 in San Onofre, California. *Schwilk Decl.*, ¶ 8 & Exs. 3, 5. Segment 11-SD-005  
10 PM 66.3-68.3 N/B is bisected by the San Onofre U.S. Border Patrol checkpoint and California  
11 Highway Patrol facility. *Schwilk Decl.*, ¶ 8 & Exs. 3, 5; *Deposition of Pedro Orso-Delgado* at 10-11.  
12 On or around November 19, 2007, Defendants erected one or two courtesy signs at segment 11-SD-  
13 005 PM 66.3-68.3 N/B to recognize Plaintiff's participation in the AAH Program.

14 On or around January 15, 2008, members of the Asian, Black, and Latino Caucuses in the  
15 California State Assembly informed Defendants that they were "extremely upset" that Plaintiff San  
16 Diego Minutemen was allowed to participate in the AAH Program, and noted that the Caucuses were  
17 planning to "take [Defendants] on." *Caltrans Internal E-mail* (Doc. # 31, Ex. 1 at 19); *Orso-Delgado*  
18 *Depos.* at 86. On or around January 15, 2008, Defendants received an e-mail from Enrique Morones  
19 of "Border Angels/Gente United," which "demand[ed]" that Plaintiff's AAH Program courtesy signs  
20 be "REMOVED, PERIOD!" and noted that "WE DO NOT ACCEPT THE SAN DIEGO  
21 MINUTEMAN SIGNAGE ANY WHERE." *E-mail From Enrique Morones to Defendant Orso-*  
22 *Delgado* (Doc. # 31, Ex. 1 at 18) (emphasis in original); *Orso-Delgado Depos.* at 102-03. Morones'  
23 e-mail characterized Plaintiff as a "racist hate group[.]" and noted that having a sign recognizing  
24 Plaintiff's group on a freeway was a "major distraction and could attract disruptive actions . . . that  
25 could be a major safety concern." (Doc. # 31, Ex. 1 at 18). Defendants received other  
26 communications from persons and groups opposed to Plaintiff's participation in the AAH Program.  
27 *Deposition of William Allan Kempton (Kempton Depos.)* at 10; *Orso-Delgado Depos.* at 37.

28 On or after January 15, 2008, Defendant Will Kempton met with members of the Latino



1 Legislative Caucus, including Senator Gil Sedillo, Assembly Member Joe Codo, and Assembly  
2 Member Lori Saldania, regarding Plaintiff's participation in the Adopt-A-Highway Program.  
3 *Kempton Depos.* at 17-18; (Doc. # 32, Ex. 2 at 5). Kempton testified that the members of the Latino  
4 Legislative Caucus "expressed concern" that the AAH Program would allow a group which advocates  
5 violent behavior to participate, and Assembly Member Saldania noted that members of Plaintiff's  
6 organization "intentionally attempted to obstruct community events in her district." *Kempton Depos.*  
7 at 18-21; (Doc. # 32, Ex. 2 at 5). In a follow-up letter to Kempton dated January 24, 2008, the Latino  
8 Legislative Caucus noted that they would "continue to insist that the history of discrimination and  
9 violence by the Minutemen is enough evidence to permanently ban this organization from ever  
10 participating in the Adopt-A-Highway Program." (Doc. # 32, Ex. 2 at 5); *Kempton Depos.* at 24.

11 On or about January 17, 2008, members of Plaintiff San Diego Minutemen collected litter  
12 along their assigned portion of Interstate 5 in compliance with the encroachment permit. *Schwilk*  
13 *Decl.*, ¶ 5 & Ex. 2. During the time that Plaintiff's members picked up trash, there was no  
14 "commotion or violence." *Schwilk Decl.*, ¶ 5.

15 On or before January 23, 2008, Defendants Kempton and Orso-Delgado revoked Plaintiff's  
16 site-specific AAH Program permit and thereafter removed Plaintiff's AAH Program courtesy signs  
17 from Interstate 5. *Orso-Delgado Depos.* at 8-9; *Kempton Depos.* at 14, 18-19, 47; *Schwilk Decl.*, Ex.  
18 7. Orso-Delgado and Kempton each testified at deposition that the intent was to relocate Plaintiff's  
19 courtesy signs to another location, however, Orso-Delgado stated that Defendant Caltrans removed  
20 Plaintiff's courtesy signs and did not reinstall them at another location. *Orso-Delgado Depos.* at 2;  
21 *Kempton Depos.* at 25. With respect to Plaintiff's site-specific AAH Program permit, Defendant  
22 Kempton stated at deposition that, "[t]echnically, that existing permit was revoked." *Kempton Depos.*  
23 at 47-48.

24 Pursuant to the California Department of Transportation Adopt-A-Highway Program  
25 Guidelines and Coordinator's Handbook, Adopt-A-Highway Program "permits may be cancelled for  
26 several reasons, including:"

- 27 - Permittee requests cancellation.
- 28 - Permit violations.

- 1 - Site fails to meet current site review criteria.
- 2 - Majority of site undergoing long-term construction.

3 (Doc. # 19-4 at 3-16). In addition, the Handbook states the following:

4 Four steps must be taken when cancelling or revoking Adopt-A-Highway  
5 encroachment permits. District AAH Coordinators must:

- 6 1. Inform the Permittee by telephone (or in person) that, effective immediately, they  
7 may no longer perform Adopt-A-Highway tasks. An explanation for the action must  
8 be given.
- 9 2. Follow up the initial notification with a letter stating why the permit is being  
10 cancelled and the date that the cancellation became effective.
- 11 3. Forward a request for the permit's cancellation to the District Permits Branch. The  
12 request must include the reason for the request and copies of any warning and/or  
13 cancellation letters must be attached.
- 14 4. Submit a work order for removal of the recognition panel. Note: a contractor,  
15 whose permit has been revoked, would no longer have legal right to enter the right of  
16 way to remove a panel.

17 (Doc. # 19-4 at 3-16).

18 Defendants initially revoked Plaintiff's permit and attempted to relocate Plaintiff's AAH  
19 Program courtesy sign because of "safety" concerns. *Kempton Depos.* at 14. With respect to those  
20 concerns, Kempton stated at deposition that,

21 My concern was, given the volatility of this issue, from my perspective, that we had  
22 the prospects of a confrontation that might occur at that location between the folks that  
23 would actually be out there cleaning up the highway under the permit and other  
24 individuals who might disagree with them, that there could be potentially a problem  
25 with people traveling by the site, throwing objects at the folks actually doing the litter  
26 pickup, or someone just stopping along the roadway, which is a dangerous situation  
27 in and of itself, to cut down a sign that had the Minutemen adoption listed on it.

28 *Kempton Depos.* at 13. Kempton stated the there was a risk of confrontation on Interstate 5 if  
Plaintiff's sign remained because of "the Minutemen's concern about immigration and the fact that  
there would be significant traffic along that corridor, including immigrant traffic . . . ." *Kempton*  
*Depos.* at 13. When asked how "relocating" Plaintiff's sign to another location would alleviate the  
safety concerns, Kempton stated that, "relocating the sign takes the sign and the Adopt-A-Highway  
section away from a location which might result in some controversy or controversial acts and puts  
it on another location of the State highway system where that kind of confrontation is certainly less  
likely to occur." *Kempton Depos.* at 25. Kempton noted that confrontations were less likely to occur

1 at other AAH locations when compared to segment 11-SD-005 PM 66.3-68.3 N/B because of the  
 2 concentration of “immigration traffic” at segment 11-SD-005 PM 66.3-68.3 N/B, which would be “in  
 3 very close proximity to a sign that could inspire some controversy.” *Kempton Depos.* at 25. Orso-  
 4 Delgado stated that Defendants identified another location for Plaintiff’s participation in the AAH  
 5 Program on State Route 52, and noted that it was a “better” location “because we don’t have the  
 6 amount of traffic. We don’t have a [California Highway Patrol] facility nor a Border Patrol facility.”  
 7 *Orso-Delgado Depos.* at 24, 10-11.<sup>3</sup> Orso-Delgado noted that Plaintiff’s name on the AAH Program  
 8 sign represents Plaintiff’s message—a message Orso-Delgado characterized as “want[ing] people to  
 9 be here legally”—and indicated that Plaintiff’s message was part of a “big debate” which Defendants  
 10 did not want to happen “on the side of I-5 where, you know, god forbid, that an accident or anything  
 11 like that could happen because of it.” *Orso-Delgado Depos.* at 13.

12 Defendant Kempton made the decision to relocate Plaintiff’s sign and characterized that  
 13 decision and the conclusion that Plaintiff’s sign created safety concerns as “subjective.” *Kempton*  
 14 *Depos.* at 13-14. When asked to identify the criteria used to select another location for Plaintiff’s sign,  
 15 Kempton stated, “I did not personally use any criteria.” *Kempton Depos.* at 14. Kempton noted that,

16 It just seemed that we needed to relocate [Plaintiff’s AAH Program courtesy] sign to  
 17 a location that was less significant with respect to an immigration facility in close  
 proximity to an area of highway adopted by the Minutemen group.

18 *Kempton Depos.* at 14. With respect to the decision to revoke Plaintiff’s site-specific AAH Program  
 19 permit, Defendant Orso-Delgado testified at deposition that there was a procedure in the AAH  
 20 Program guidelines for revoking a permit which Defendants followed. *Orso-Delgado Depos.* at 30-  
 21 32. However, when asked to identify the procedures at deposition, Orso-Delgado conceded that he  
 22 didn’t know the procedures. *Orso-Delgado Depos.* at 32-33. When shown a copy of the AAH  
 23 Program Guidelines and Coordinator’s Handbook, Orso-Delgado admitted that he had never reviewed  
 24 it. *Orso-Delgado Depos.* at 37.

25 On January 28, 2008, Plaintiff received a letter from Defendant Orso-Delgado notifying  
 26 Plaintiff that Plaintiff’s encroachment permit “is hereby modified,” and that “the related courtesy sign  
 27

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28 <sup>3</sup> According to Orso-Delgado, the traffic at the State Route 52 location is less than the traffic  
 at the San Onofre location along Interstate 5 by about 3 to 1. *Orso-Delgado Depos.* at 24.

1 will be removed.” *Schwilk Decl.*, Ex. 3. The letter noted that,

2 The location of your existing Adopt-A-Highway (AAH) permit has raised questions  
3 regarding public safety due to the proximity of your assigned highway segment to a  
4 U.S. Border Patrol facility that is co-located with the California Highway Patrol (CHP)  
5 San Onofre Inspection facility. Your group has also indicated concerns regarding  
possible vandalism to the courtesy sign displaying your participation in the AAH  
Program and the release of information relative to the days you will perform the  
required clean up.

6 *Schwilk Decl.*, Ex. 3. The letter further noted that Plaintiff’s participation in the AAH Program at the  
7 location in San Onofre, posed “a significant risk of disruption to the operation of the State highway,  
8 as well as public safety concerns for both the traveling public and the participants in the AAH  
9 Program.” *Schwilk Decl.*, Ex. 3.

10 In addition to safety concerns, the revocation letter of January 28, 2008, stated that Caltrans  
11 was “currently examining allegations of violent behavior and/or advocacy of violence by [Plaintiff’s]  
12 group.” *Schwilk*, Ex. 3. The letter informed Plaintiff that,

13 Under the AAH Program eligibility criteria, entities that advocate violence, violation  
14 of the law, or discrimination based upon race, religion, color, national origin, ancestry,  
15 physical handicap, medical condition, marital status, age, sex, or sexual orientation  
may not participate in the Program.

16 *Schwilk Decl.*, Ex. 3.

17 On or after January 28, 2008, Defendants removed Plaintiff’s AAH Program courtesy signs  
18 from their location along Interstate 5 in San Onofre, California. *Schwilk Decl.*, ¶ 3. Defendant  
19 Kempton stated at deposition that Plaintiff’s site-specific AAH Program permit was a “contract” that  
20 had been “revoked.” *Kempton Depos.* at 47-48.

21 On or after March 18, 2008, and approximately two or three months after Defendants revoked  
22 Plaintiff’s site-specific AAH Program permit and removed Plaintiff’s courtesy sign from AAH  
23 Program segment 11-SD-005 PM 66.3-68.3 N/B, Defendant Orso-Delgado removed section 11-SD-  
24 005 PM 66.3-68.3 N/B from the AAH Program altogether. *Orso-Delgado Depos.* at 20-21. Orso-  
25 Delgado concluded that retaining AAH Program segments near U.S. Border Patrol checkpoints and  
26 other law enforcement facilities created an unacceptable safety risk given the extra traffic in those  
27 areas. *Orso-Delgado Depos.* at 10-11, 24, 70. Orso-Delgado consulted with Caltrans Chief Deputy  
28 of Maintenance and Operations Bill Valle and asked Valle to identify AAH Program segments  
similarly situated to segment 11-SD-005 PM 66.3-68.3 N/B so that Defendants could remove those

1 segments from the AAH Program. *Orso-Delgado Depos.* at 21. At the time of his deposition,  
 2 Defendant Orso-Delgado knew of other segments in the AAH Program “with similar situations,” and  
 3 testified that those segments would be removed from the AAH Program for safety reasons. *Orso-*  
 4 *Delgado Depos.* at 70.<sup>4</sup> Orso-Delgado testified, however, that segments similarly situated to segment  
 5 number 11-SD-005 PM 66.3-68.3 N/B—i.e., those segments associated with U.S. Border Patrol  
 6 checkpoints and other commercial vehicle enforcement facilities—would not be removed from the  
 7 AAH Program until the current permit lapsed or the adoptee left the AAH Program. *Orso-Delgado*  
 8 *Depos.* at 21-22, 69-70, 88. For example, Orso-Delgado indicated that the south-bound segment of  
 9 Interstate 5 directly across from segment 11-SD-005 PM 66.3-68.3 N/B would be removed for safety  
 10 reasons “when the segment lapses.” *Orso-Delgado Depos.* at 22.<sup>5</sup>

11 Orso-Delgado testified at deposition with respect to the reasons and justification for allowing  
 12 AAH Program participants with permits for locations similar to segment 11-SD-005 PM 66.3-68.3  
 13 N/B to remain in the AAH Program until their permits lapsed, but requiring Plaintiff to relocate  
 14 immediately:

15 Q. What about the other side of the interstate [5] across [from Plaintiff’s segment]  
 16 – let’s see. That would be the Southbound side.

17 A. Yes, sir.

18 Q. Are you going to remove that from the system as well?

19 A. When the segment lapses, yes, we will.

20 Q. Well, if it is unsafe, why are you waiting for the segment to lapse?

21 A. It hasn’t created the controversy that [Plaintiff’s segment] did.

22 Q. Okay. So we’re back to the sign – the message of [Plaintiff’s] sign creating  
 23 controversy?

24 A. Uh-Huh.

25 Q. “Yes”?

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26 <sup>4</sup> The segments “with similar situations” were variously identified as segments on Interstate  
 15, Interstate 8, Interstate 5, State Route 94, and State Route 905. *Orso-Delgado Depos.* at 21, 70.

27 <sup>5</sup> At oral argument, Defendants’ counsel stated that segments other than segment 11-SD-005  
 28 PM 66.3-68.3 N/B had been removed from the AAH Program, but noted that the current permittees  
 were being permitted to remain until their permits lapsed. *Certified Transcript of Oral Argument*  
*Transcript* at 15.

1 A. Yes.

2 *Orso-Delgado Depos.* at 22.

3 In revoking Plaintiff's site-specific AAH Program permit, Defendants investigated Plaintiff's  
4 organization to determine if the organization was discriminatory or violent. *Orso-Delgado Depos.*  
5 at 86-87; *Kempton Depos.* at 23-24. During the investigation, Kempton testified that he did not see  
6 anything about Plaintiff's organization that advocated "racism," "hatred," or "violent behavior."  
7 *Kempton Depos.* at 23-24. In removing AAH Program segment 11-SD-005 PM 66.3-68.3 N/B from  
8 the AAH Program, Orso-Delgado was aware that neither the California Highway Patrol nor the AAH  
9 Program had encountered any problems at the location previously. *Orso-Delgado Depos.* at 26, 40.<sup>6</sup>  
10 Segment 11-SD-005 / 66.3-68.3 N/B "had been adoptable for years and ha[d] a clean slate with past  
11 volunteers." *Orso-Delgado Depos.* at 26; (Doc. # 31, Ex. 1 at 19).

12 **B. Standard of Review - Motion for Preliminary Injunction**

13 FED. R. CIV. P. 65(a) provides that the court may issue a preliminary injunction upon notice  
14 to the adverse party.

15 "Preliminary injunctive relief is available to a party who demonstrates either (1) a combination  
16 of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions  
17 are raised and the balance of hardships tips in its favor." *Sammartano*, 303 F.3d at 965 (citing *A&M*  
18 *Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001)); *see also Preminger v. Principi*,  
19 422 F.3d 815, 822-23 (9th Cir. 2005); *Requa v. Kent School Dist.*, 492 F. Supp. 2d 1272, 1276-77  
20 (W.D. Wash. 2007). "Each of these two formulations requires an examination of both the potential  
21 merits of the asserted claims and the harm or hardships faced by the parties," and in practice, "these  
22 two formulations represent two points on a sliding scale in which the required degree of irreparable  
23 harm increases as the probability of success decreases." *Sammartano*, 303 F.3d at 965. "[I]n cases  
24 where the public interest is involved, the district court must also examine whether the public interest  
25 favors the plaintiff." *Sammartano*, 303 F.3d at 965; *see also Preminger*, 422 F.3d at 823.

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26  
27 <sup>6</sup> Orso-Delgado testified at deposition that the California Highway Patrol believed there was  
28 a "potential" safety concern if Plaintiff retained the AAH Program location on Interstate 5 at San  
Onofre because the immigration issue was "polarizing," and there was the potential for "vandalism"  
and people "pulling off the road." *Orso-Delgado Depos.* at 26-27.



“While the basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits, . . . the status quo is not simply any situation before the filing of the lawsuit, but rather the last uncontested status that preceded the parties’ controversy.” *Dep’t of Parks & Rec. v. Basaar Del Mundo, Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006); *see GoTo.Com v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“[T]he status quo ante litem refers . . . to the last uncontested status which preceded the pending controversy.”). In this case, the last uncontested status which preceded this controversy is that time at which Plaintiff possessed an AAH Program permit and Plaintiff’s courtesy signs were displayed at segment 11-SD-005 PM 66.3-68.3 N/B.

### C. First Amendment

Plaintiff contends that it is entitled to a preliminary injunction ordering Defendants to reissue Plaintiff’s AAH Program permit for segment 11-SD-005 PM 66.3-68.3 N/B and reinstall Plaintiff’s AAH Program courtesy signs reading “San Diego Minutemen” because Defendants revoked Plaintiff’s permit and removed Plaintiff’s courtesy sign unreasonably and in a viewpoint biased manner in violation of Plaintiff’s First Amendment rights.

#### 1. Probability of Success on the Merits

This Court has already concluded that participation in the AAH Program is “sufficiently imbued with elements of communication” so as to be protected by the First Amendment. *See supra* Opinion Section I(C)(3)(a); *Hungerbeeler*, 370 F.3d at 744 (“Participation in the AAH program . . . does entail some degree of private ‘speech’ protected by the First Amendment.”); *Cuffley*, 44 F.Supp.2d at 1026 (same); *Knights of the KKK*, 807 F. Supp. At 1435-36 (same). Accordingly, the Court needs to determine the scope of protection which AAH Program participants enjoy in light of the facts of this case.

The Constitution does not require the Government to “freely grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.” *Cornelius*, 473 U.S. at 799-800. “In assessing a First Amendment claim relating to speech on government property, the first step is to ‘identify the nature of the forum, because the extent to which the Government may



1 limit access depends on whether the forum is public or nonpublic.” *Sammartano*, 303 F.3d at 965  
 2 (citing *Cornelius*, 473 U.S. at 797); *DiLoreto*, 196 F.3d at 964. “‘Forum analysis divides government  
 3 property into three categories: [traditional] public fora, designated public fora, and nonpublic fora.’”  
 4 *DiLoreto*, 196 F.3d at 964 (citing *Children of the Rosary*, 154 F.3d at 976).

5 Because a principal purpose of traditional public fora is the free exchange of ideas,  
 6 speakers can be excluded from a public forum only when the exclusion is necessary  
 7 to serve a compelling state interest and the exclusion is narrowly drawn to achieve that  
 8 interest. Similarly, when the Government has intentionally designated a place or  
 9 means of communication as a public forum speakers cannot be excluded without a  
 10 compelling governmental interest. Access to a nonpublic forum . . . however, can be  
 11 restricted as long as the restrictions are reasonable and [are] not an effort to suppress  
 12 expression merely because public officials oppose the speaker’s view.

13 *Cornelius*, 473 U.S. at 800 (citations and internal quotations omitted); *see also Sammartano*, 303 F.3d  
 14 at 965. The Supreme Court has used the term “‘limited public forum’ to refer to a type of nonpublic  
 15 forum that the government intentionally has opened to certain groups or to certain topics.” *DiLoreto*,  
 16 196 F.3d at 965. “In a limited public forum, restrictions that are viewpoint neutral and reasonable in  
 17 light of the purpose served by the forum are permissible.” *Id.*

18 In defining the relevant forum for the purposes of the First Amendment, the focus is on “the  
 19 access sought by the speaker.” *Cornelius*, 473 U.S. at 801; *see also DiLoreto*, 196 F.3d at 965 (“The  
 20 relevant forum is defined by the access sought by the speaker.”). In this case, Plaintiff seeks  
 21 reissuance of its site-specific permit to AAH Program segment 11-SD-005 PM 66.3-68.3 N/B and  
 22 restoration of Plaintiff’s AAH Program courtesy signs at segment 11-SD-005 PM 66.3-68.3 N/B.  
 23 Accordingly, the Court concludes that the relevant forum for the purposes of the First Amendment is  
 24 AAH Program segment 11-SD-005 PM 66.3-68.3 N/B.<sup>7</sup>

25 “While public places historically associated with the free exercise of expressive activities, such  
 26 as streets, sidewalks and parks, are considered public fora, not all publicly owned property becomes  
 27 a public forum simply because the public is permitted to come and go at the site.” *Sammartano*, 303  
 28 F.3d at 966 (internal quotations and citations omitted). “‘The government, no less than a private  
 owner of property, has the power to preserve the property under its control for the use to which it is

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<sup>7</sup> Plaintiff contended at oral argument that the relevant forum was the entire AAH Program. However, the undisputed facts before the Court show that Plaintiff has not been banned from participation in the AAH Program, and it is clear that Plaintiff seeks to be restored at only one location within the Adopt-A-Highway Program—segment 11-SD-005 PM 66.3-68.3 N/B.

1 lawfully dedicated.” *Id.* (citing *United States v. Grace*, 461 U.S. 171, 178 (1983)). “It is the location  
 2 and purpose of the property and the government’s subjective intent in having the property built and  
 3 maintained, that is crucial to determining the nature of the property for forum analysis.” *Id.* (citations  
 4 omitted).

5 Chapter 2 of the Adopt-A-Highway Program Guidelines and Coordinators Handbook outlines  
 6 the purpose of the AAH Program and its courtesy signs. (Doc. # 19-4). The Handbook states that the  
 7 AAH Program courtesy signs are intended to recognize and identify contributors to the AAH Program.  
 8 (Doc. # 19-4 at 2-1). In addition, the Handbook notes that,

9 Although there is advertising value inherent in the recognition panels, they are not  
 10 intended to be an advertising medium. . . . The Adopt-A-Highway Program and its  
 courtesy signs are not a forum for advertisement or public discourse.

11 (Doc. # 19-4 at 2-1). The Court concludes that Defendants’ purpose and intent in creating the AAH  
 12 Program and segment 11-SD-005 PM 66.3-68.3 N/B was to recognize participants to the public and  
 13 not to create a traditional or designated public forum.

14 Aside from the State’s intent in creating the AAH Program, the Court concludes that the nature  
 15 and location of segment 11-SD-005 PM 66.3-68.3 N/B weighs against a finding that it is a traditional  
 16 public or designated public forum. Though there are elements of protected speech and expression in  
 17 participating in the AAH Program, the nature of that speech and expression is necessarily limited.  
 18 AAH Program participants must follow strict rules when picking up trash, *see* (Doc. # 19-4 at 8-1 to  
 19 8-5), and the content and appearance of the AAH Program courtesy signs are strictly regulated—e.g.,  
 20 “[r]ecognition panel elements are limited to **name, logo, or both** of an adopter.” (Doc. # 19-4 at 2-7  
 21 to 2-10) (emphasis in original). In addition, the goals of the AAH Program—to provide motorists with  
 22 clean and beautiful roadsides and to maximize adoptions, among other things—do not suggest that the  
 23 forum requires the freedoms associated with traditional or designated public fora. (Doc. # 19-4 at 1-  
 24 1). Finally, the location of segment 11-SD-005 PM 66.3-68.3 N/B on the Interstate 5 freeway near  
 25 San Onofre, is not as compatible with the nature of expressive activity expected at a traditional public  
 26 or designated public forum, such as assembly, debating, and protesting, as would be, for instance, a  
 27 public square or park, because segment 11-SD-005 PM 66.3-68.3 N/B is located on the shoulder of  
 28 a major freeway with high-speed vehicular traffic. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1078

(9th Cir. 2001).

After review of the record before the Court, particularly evidence bearing on the State's intent in creating the AAH Program and the location and nature of the forum, the Court concludes that AAH Program segment 11-SD-005 PM 66.3-68.3 N/B is a nonpublic forum. *See Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078-79 (5th Cir. 1995)<sup>8</sup> (concluding that an AAH Program is a nonpublic forum); *Cuffley*, 44 F. Supp. 2d at 1027 (same); *Robb v. Hungerbeeler*, 281 F. Supp. 2d 989, 1000-01 (E.D. Mo. 2003) (same); *see also Preminger*, 422 F.3d at 824 (noting that a Veterans Administration building was a nonpublic forum primarily because the government did not intend to create a public forum).

"The test for determining the constitutionality of limitations on speech in a nonpublic forum . . . is the two-part test set forth by the Court in *Cornelius*: Restrictions on free expression in a nonpublic forum are constitutional only if the distinctions drawn (1) are 'reasonable in light of the purposes served by the forum' and (2) are 'viewpoint neutral.'" *Sammartano*, 303 F.3d at 966 (citing *Cornelius*, 473 U.S. at 806).

#### *a. Reasonableness*

"The 'reasonableness' requirement for restrictions on speech in a nonpublic forum 'requires more of a showing than does the traditional rational basis test; i.e., it is not the same as establishing that the regulation is rationally related to a legitimate governmental objective, as might be the case for the typical exercise of the government's police power.'" *Sammartano*, 303 F.3d at 966-67 (citing *Tucker v. State of Calif. Dep't of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996)); *Preminger*, 422 F.3d at 824. "There must be evidence in the record to support a determination that the restriction is reasonable," in other words, "there must be evidence that the restriction reasonably fulfills a legitimate need." *Id.* "The government need not choose the least restrictive alternative when regulating speech in a nonpublic forum, . . . [h]owever, its failure to select simply available alternatives suggests that the ban it has enacted is not reasonable." *Id.* (citations omitted).

Defendants assert two justifications for their decision to revoke Plaintiff's site-specific AAH

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<sup>8</sup> In *Pocatello Educ. Ass'n v. Heideman*, 504 F.3d 1053, 1066 (9th Cir. 2007), the Court of Appeal for the Ninth Circuit cited with approval the Court of Appeals for the Fifth Circuit's conclusion that an Adopt-A-Highway Program is a nonpublic forum.

1 Program permit and remove Plaintiff's AAH Program courtesy signs. The first justification, originally  
 2 asserted by Defendants in January of 2008, notes that Plaintiff's permit had to be revoked and  
 3 Plaintiff's courtesy signs had to be removed because Plaintiff's organization "raised questions  
 4 regarding public safety" due to the proximity of segment 11-SD-005 PM 66.3-68.3 N/B to a "U.S.  
 5 Border Patrol facility that is co-located with the California Department of Highway Patrol (CHP) San  
 6 Onofre Inspection facility." *Schwilk Decl.* at Ex. 3. Specifically, Defendants contend that Plaintiff's  
 7 involvement with immigration—which Defendants characterize as a "polarizing" issue—creates a safety  
 8 issue with respect to Plaintiff's participation in the AAH Program at segment 11-SD-005 PM 66.3-  
 9 68.3 N/B because of the traffic near that segment and the fact persons who disagree with Plaintiff's  
 10 position on immigration might want to vandalize Plaintiff's courtesy signs or create disruptions as a  
 11 result of seeing Plaintiff's courtesy signs or Plaintiff's members picking up trash. *See Orso-Delgado*  
 12 *Depos.* at 11; *Kempton Depos.* at 13. Describing the January, 2008, decision to revoke Plaintiff's  
 13 permit at deposition, Defendant Kempton noted that,

14 My concern was, given the volatility of this issue, from my perspective, that we had  
 15 the prospects of a confrontation that might occur at that location between the folks that  
 16 would actually be out there cleaning up the highway under the permit and other  
 17 individuals who might disagree with them, that there could be potentially a problem  
 with people traveling by the site, throwing objects at the folks actually doing the litter  
 pickup, or someone just stopping along the roadway, which is a dangerous situation  
 in and of itself, to cut down a sign that had the Minutemen adoption listed on it.

18 *Kempton Depos.* at 13. Kempton further stated the there was a risk of confrontation on Interstate 5  
 19 if Plaintiff's sign remained because of "the Minutemen's concern about immigration and the fact that  
 20 there would be significant traffic along that corridor, including immigrant traffic . . . ." *Kempton*  
 21 *Depos.* at 13.

22 The record establishes that Defendants' first justification for revoking Plaintiff's site-specific  
 23 permit centers on Defendants' determination that persons opposed to Plaintiff's position on  
 24 immigration might confront Plaintiff's members on the highway and/or cause disruptions in opposition  
 25 to Plaintiff's message and thereby create a safety hazard.<sup>9</sup> It is undisputed that (1) on January 17,

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27 <sup>9</sup> Kempton stated at deposition, "Well, I think that the issue of immigration is certainly, by  
 28 most reasoned considerations, an issue of some controversy in this country. And you—when you have  
 one community that becomes pitted against another community, whatever the reason, certainly  
 confrontations from time to time do occur. . . . And this issue of the Minutemen's concern about

2008, Plaintiff's members picked up trash at segment 11-SD-005 PM 66.3-68.3 N/B without incident, and (2) neither of Plaintiff's AAH Program courtesy signs was vandalized while installed at segment 11-SD-005 PM 66.3-68.3 N/B.

As noted by the Court of Appeal for the Ninth Circuit in *Sammartano*, the government may not restrict speech because there may be a negative reaction to that speech by members of the public. 303 F.3d at 969 (citing *Cohen v. California*, 403 U.S. 15, 22-23 (1971); see also *Hungerbeeler*, 370 F.3d at 743. "*Cohen* stands for the proposition that even in light of the purposes of the forum, it is not reasonable to prohibit speech . . . merely because it may offend some people's sense of decorum." *Id.* The record in this case shows that Defendants' fears of highway confrontation and commotion are speculative, and the Court finds that Defendants' justification for restricting Plaintiff's speech "reflects an undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression." *Id.* (citing *Cohen*, 403 U.S. at 23). Because Defendants' first justification is centered on Defendants' belief that persons opposed to Plaintiff's organization could create safety issues through violent or disruptive action, the Court concludes that Defendants' first justification is not reasonable in light of *Sammartano* and *Cohen*. See also *Lewis v. Wilson*, 253 F.3d 1077, 1081-82 (8th Cir. 2001) ("[T]he mere possibility of a violent reaction to Ms. Lewis's speech is simply not a constitutional basis on which to restrict her right to speak. . . . The First Amendment knows no heckler's veto.")<sup>10</sup>; *Hungerbeeler*, 370 F.3d at 743 ("The State also may not censor AAH applicants'

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immigration and the fact that there would be significant traffic along that corridor, including immigrant traffic, that there was a risk of that kind of confrontation occurring." *Kempton Depos.* at 13. When asked if "safety" concerns arose because of "the possible adverse reaction by members of the Latino community and other groups reacting to the message of the Minutemen as to their position on immigration," Defendant Kempton answered, "[t]hat's fair." *Kempton Depos.* at 16-17. Orso-Delgado testified at deposition that the California Highway Patrol believed there might be a safety issue with respect to Plaintiff's participation in the AAH Program at segment 11-SD-005 PM 66.3-68.3 N/B because some persons might react negatively to Plaintiff's participation in the AAH Program. *Orso-Delgado Depos.* at 26-27.

<sup>10</sup> In *Lewis*, the Court of Appeal for the Eighth Circuit evaluated a First Amendment challenge to the State of Missouri's rejection of an application for a personalized license plate which read, "ARYAN-1." *Lewis*, 253 F.3d at 1078. Missouri argued that the rejection was permissible because its concern was "with highway safety rather than the mere offensiveness" of the license plate; specifically, the State noted its concern that the proposed plate could provoke a violent reaction from other motorists. *Id.* at 1081. The Court, however, concluded that any safety concern was a primary, rather than secondary effect, of the message on the plate, and therefore the "safety risk" was not grounds upon which the State could constitutionally restrict speech. *Id.* at 1081-1082; see also *City*

1 speech because of the potential responses of its recipients, . . . the State's desire to exclude  
 2 controversial organizations is order to prevent 'road rage' or public backlash on the highways against  
 3 the adopters' unpopular beliefs is simply not a legitimate governmental interest."); *Hopper*, 241 F.3d  
 4 at 1079-80 ("Not only was Pasco's policy intrinsically flawed, its enforcement of the policy was, in  
 5 practice, contingent upon the subjective reaction of viewers of the artwork, as perceived by the city  
 6 management. Such censorship by public opinion only adds to the risk of constitutional impropriety.").  
 7 The Court further concludes that the record does not establish that the restriction—revoking Plaintiff's  
 8 site-specific permit and removing Plaintiff's AAH Program courtesy signs—reasonably fulfills a  
 9 "legitimate" safety need. *Sammartano*, 303 F.3d at 969. The feared negative reaction to Plaintiff's  
 10 participation at segment 11-SD-005 PM 66.3-68.3 N/B is speculative, and based on the record before  
 11 the Court, does not establish a legitimate need for the safety measure imposed.

12 Defendants' second justification for revoking Plaintiff's site-specific permit and removing  
 13 Plaintiff's AAH Program courtesy signs, asserted for the first time after Plaintiff filed the Complaint  
 14 in this case, is that the permit revocation and sign removal were necessary pursuant to Defendants'  
 15 plan to remove all AAH Program segments near law enforcement facilities from the AAH Program.  
 16 *See, e.g., Orso-Delgado Depos.* at 21, 69-70 (indicating that the focus was not just on segment 11-SD-  
 17 005 PM 66.3-68.3 N/B). Specifically, Defendants assert that they had to remove segment 11-SD-005  
 18 PM 66.3-68.3 N/B from the AAH Program because it was close to a U.S. Border Patrol checkpoint  
 19 and created a safety concern because of increased traffic and law enforcement activity near the  
 20 checkpoint. *Orso Delgado Depos.* at 10-11. Defendants contend that they needed to remove all AAH  
 21 Program segments near law enforcement facilities because of traffic concerns and safety risks. *See*  
 22 *Orso-Delgado Depos.* at 10-11, 24, 70.<sup>11</sup>

23 The problem with Defendants' second justification is two-fold. First, the justification is not  
 24 supported by evidence in the record. As noted above, "[t]here must be evidence in the record to  
 25 support a determination that the restriction is reasonable . . . [t]hat is, there must be evidence that the

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26 *of Erie v. Pap's A.M.*, 529 U.S. 277, 291, 293-296 (2000) (noting difference between primary v.  
 27 secondary effects of a regulation).

28 <sup>11</sup> It should be noted that Defendants asserted this second justification at least two months after  
 revoking Plaintiff's permit and removing Plaintiff's courtesy sign. *Orso-Delgado Depos.* at 20-21.



1 restriction reasonably fulfills a legitimate need.” *Sammartano*, 303 F.3d 967. Here, there is no  
2 evidence that traffic concerns at segment 11-SD-005 PM 66.3-68.3 N/B, or near U.S. Border Patrol  
3 checkpoints or highway law enforcement facilities generally, have ever caused a safety issue for  
4 traveling motorists or AAH Program participants. In fact, with respect to segment 11-SD-005 PM  
5 66.3-68.3 N/B, the evidence reflects that the segment has been part of the AAH Program “for years”  
6 and “has a clean slate with past volunteers.” (Doc. # 31, Ex. 1 at 19).

7       The second problem with Defendants’ justification that safety concerns forced Defendants to  
8 remove Plaintiff’s segment from the AAH Program pursuant to a plan or policy of removing all AAH  
9 Program segments near law enforcement facilities from the AAH Program, is that Defendants have  
10 not, in fact, removed all segments of the AAH Program near law enforcement facilities from the AAH  
11 Program. Rather, Defendants have allowed all AAH Program segments near law enforcement  
12 facilities, except for Plaintiff’s segment, to remain in the AAH Program until the current permittee  
13 lapses or leaves the AAH Program.<sup>12</sup> Plaintiff was not given an opportunity to remain at segment 11-  
14 SD-005 PM 66.3-68.3 N/B until its permit lapsed, and it is undisputed that Plaintiff did not voluntarily  
15 leave the AAH Program. There is no evidence before the Court which establishes a difference with  
16 respect to safety between segment 11-SD-005 PM 66.3-68.3 N/B and other AAH Program segments  
17 near law enforcement facilities. Accordingly, without identifying a difference between segment 11-  
18 SD-005 PM 66.3-68.3 N/B and other AAH Program segments near law enforcement facilities, the  
19 facts of this case indicate that Defendants have treated Plaintiff and segment 11-SD-005 PM 66.3-68.3  
20 N/B differently than other similarly situated AAH Program participants and segments.

21       In addition to the problems noted above, Defendants have not identified any standards which  
22 they used to evaluate the safety risks allegedly at issue in this case. Defendants have not identified  
23 a standard for determining when a message is controversial, or how, why or when the controversial  
24 message of an AAH Program participant is deemed a safety concern. Where there are no substantive  
25 standards, a court must scrutinize the government’s practice “all the more closely for apparent  
26 inconsistency or abuse in enforcing the policy.” *Hopper*, 241 F.3d at 1080; *see also Lakewood*, 486

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28       <sup>12</sup> AAH Program permits last five (5) years. *Adopt-A-Highway Program Guidelines & Coordinator’s Handbook* (Doc. # 19-4) at 3-7.



U.S. at 758 (noting that without standards, “post-hoc rationalizations . . . and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression”). Here, the rule of *Hopper* and *Lakewood* is particularly applicable, as Defendants have restricted Plaintiff’s speech pursuant to a policy requiring removal of all AAH Program segments near law enforcement facilities, but have in practice only removed that segment belonging to Plaintiff from the AAH Program. Furthermore, Defendants did not cite this policy until after this litigation began, *Orso-Delgado Depos.* at 20-21, and have submitted no evidence which would reasonably or legitimately support the need for safety restrictions at or around law enforcement facilities.<sup>13</sup> To the extent that Defendants contend that they removed Plaintiff’s AAH Program segment pursuant to a plan or policy requiring removal of all AAH Program segments near law enforcement facilities because of safety concerns, the Court finds that the justification is not supported by the evidence. *Hopper*, 241 F.3d at 1080 (recognizing that courts must be wary of post-hoc distinctions to rationalize inconsistent treatment); *see also Lakewood*, 486 U.S. 758-59 (same).

The Court concludes that neither of Defendants’ justifications for the restrictions on Plaintiff’s speech and expression are reasonable under the facts of this case.<sup>14</sup> Accordingly, the Court concludes that Plaintiff has a high probability of success on the merits of its First Amendment claim.

## 2. Irreparable Harm and the Balance of the Hardships

“Where plaintiffs seeking a preliminary injunction demonstrate a high probability of success on the merits, they need demonstrate only the possibility of irreparable harm as part of the balancing of the hardships.” *Sammartano*, 303 F.3d at 972.

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<sup>13</sup> Defendants have submitted evidence that there is increased traffic around law enforcement facilities and segment 11-SD-005 PM 66.3-68.3 N/B. However, there is no evidence linking that traffic to safety risks associated with the AAH Program.

<sup>14</sup> The Court notes that “[t]he government has an inherent right to control its property,” which generally includes the right “to close a previously open forum.” *DiLoreto*, 196 F.3d at 970. However, under the facts of this case, the Court finds that Defendants do not have the absolute right to close segment 11-SD-005 PM 66.3-68.3 N/B pursuant to a general policy requiring closure of all AAH Program segments near law enforcement facilities, when Defendants concede that the policy is only being enforced against Plaintiff and segment 11-SD-005 PM 66.3-68.3 N/B. As noted previously, Defendants’ general justification must be closely scrutinized where, as here, the justification is applied selectively to restrict speech and expression. *See Hopper*, 241 F.3d at 1080.

1 “The Supreme Court has made clear that ‘the loss of First Amendment freedoms, for even  
 2 minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of the issuance  
 3 of a preliminary injunction.” *Id.* at 973 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also*  
 4 *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998); *Assoc. Gen. Contractors of Calif.*  
 5 *v. Coalition for Econ. Equal.*, 950 F.2d 1401, 1412-13 (9th Cir. 1991). Here, Plaintiff has established  
 6 a high probability of success on the merits of its First Amendment claim, and thus the Court concludes  
 7 that Plaintiff has established the possibility of irreparable harm. *See Sammartano*, 303 F.3d at 973  
 8 (“Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment  
 9 context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the  
 10 existence of a colorable First Amendment claim.”). The Court further concludes that the balance of  
 11 hardships tip in favor of Plaintiff in this case, because even if the merits of Plaintiff’s constitutional  
 12 claim were not clearly established, the Court concludes that Plaintiff’s case would still raise “serious  
 13 First Amendment questions,” which “compels a finding . . . at the very least [that] the balance of  
 14 hardships tips sharply in [Plaintiff’s] favor.” *Sammartano*, 303 F.3d at 973 (citing *Viacom Int’l, Inc.*  
 15 *v. FCC*, 828 F. Supp. 741, 744 (N.D. Cal. 1993)). Defendants have not submitted evidence that they  
 16 would suffer hardship if the injunction were to issue in this case.

17 The Court concludes that Plaintiff will suffer irreparable harm if the injunction does not issue.

### 18 3. The Public Interest

19 A court is required to “examine the public interest in determining the appropriateness of a  
 20 preliminary injunction.” *Sammartano*, 303 F.3d at 974. “The public interest inquiry primarily  
 21 addresses impact on non-parties rather than parties.” *Id.*

22 “Courts considering requests for preliminary injunctions have consistently recognized the  
 23 significant public interest in upholding First Amendment principles.” *Id.* (citing *Homans v.*  
 24 *Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001); *Iowa Right to Life Comm’e, Inc. v. Williams*, 197  
 25 F.3d 963, 970 (8th Cir. 1999)). Accordingly, the Court notes that the injunction in this case serves  
 26 the public interest by protecting Plaintiff’s constitutional rights.

27 “The public interest in maintaining a free exchange of ideas, though great, has in some cases  
 28 been found to be overcome by a strong showing of other competing public interests, especially where

1 the First Amendment activities of the public are only limited, rather than entirely eliminated.”  
2 *Sammartano*, 303 F.3d at 974-75. Here, Defendants contend that the public’s interest in “safety and  
3 operational concerns” outweighs any “minimal First Amendment rights laid claim to by plaintiff.”  
4 (Doc. # 26 at 8). However, the Court concludes that (1) Plaintiff’s First Amendment rights are not  
5 minimal, but in fact “significant,” *see Sammartano*, 303 F.3d at 974, and (2) there is little, if any,  
6 evidence to support Defendants’ assertion that Plaintiff’s participation in the AAH Program at  
7 segment 11-SD-005 PM 66.3-68.3 N/B, or the existence of segment 11-SD-005 PM 66.3-68.3 N/B  
8 in the AAH Program in the first instance, would endanger the public. The Court concludes that  
9 Defendants “have made virtually no factual showing, on the current record, to support the claimed  
10 need” for the restrictions imposed on Plaintiff’s speech. *See Sammartano*, 303 F.3d at 975.

11 After reviewing the record, the Court concludes that the public interest favors imposition of  
12 an injunction in this case.

13 Plaintiff has established a high probability of success on the merits, the potential for irreparable  
14 harm, and that the balance of hardships tips sharply in Plaintiff’s favor. The Court further concludes  
15 that the public interest favors imposition of the injunction and the protection of First Amendment  
16 freedoms under the facts of the case before the Court at this time. Notwithstanding those conclusions,  
17 Defendants contend that an injunction should not issue under the facts of this case because Plaintiff  
18 seeks a mandatory injunction, which is “subject to a heightened scrutiny and should not be issued  
19 unless the facts and the law clearly favor the moving party.” *Dahl v. HEM Pharm. Corp.*, 7 F.3d  
20 1399, 1404 (9th Cir. 1993); *see also Stanley v. U.S.C.*, 13 F.3d 1313, 1320 (1994).

21 The parties dispute whether Plaintiff seeks a mandatory injunction. A mandatory injunction  
22 is often juxtaposed with a prohibitory injunction, where a prohibitory injunction is defined as  
23 something which “preserves the status quo,” while a mandatory injunction is defined as an injunction  
24 that “goes well beyond simply maintaining the status quo pendente lite . . .” *Stanley*, 13 F.3d at 1320.  
25 Plaintiff seeks to preserve the status quo ante litem—“the last uncontested status that preceded the  
26 parties’ controversy”—while a mandatory injunction is defined with respect to the status quo pendente  
27 lite—the status quo pending suit. *GoTo.Com*, 202 F.3d at 1210; *Stanley*, 13 F.3d at 1320. When  
28 considered in light of *Stanley*’s distinction between mandatory and prohibitory injunctions, the

1 heightened scrutiny afforded requests for mandatory injunctive relief makes sense because in effect  
2 a mandatory injunction changes the position of the parties as opposed to preserving the status quo.  
3 However, the Court of Appeal for the Ninth Circuit has recently stated that “the basic function of a  
4 preliminary injunction is to preserve the status quo pending a determination of the action on the  
5 merits,” and defined “the status quo” as “not simply any situation before the filing of the lawsuit, but  
6 rather the last uncontested status that preceded the parties’ controversy.” *Dep’t of Parks & Rec.*, 448  
7 F.3d at 1124. Given the Court of Appeals’ most recent pronouncement on the issue, the Court  
8 concludes that Plaintiff’s injunctive request should not be considered mandatory as that term is used  
9 in *Stanley* because Plaintiff is simply invoking the basic purpose of a preliminary injunction, and thus  
10 should not be subject to heightened scrutiny. However, the Court concludes that even under the  
11 heightened standard of a “mandatory” injunction, Plaintiff has established that the “facts and law  
12 clearly favor” granting the injunction in this case. *See Dahl*, 7 F.3d at 1403. Plaintiff has established  
13 a high probability of success on the merits, that it will suffer irreparable harm, that the balance of  
14 hardships tips sharply in its favor, and that the public interest favors the injunction.

15 Plaintiff’s motion for a preliminary injunction (Doc. # 13) requiring that Defendants reinstate  
16 Plaintiff’s permit for AAH Program segment 11-SD-005 PM 66.3-68.3 N/B and reinstall Plaintiff’s  
17 courtesy signs during the pendency of this litigation is GRANTED.

### 18 CONCLUSION

19 Defendants’ motion to dismiss (Doc. # 19) is GRANTED in part, and DENIED in part.  
20 Defendants’ motion to dismiss Defendant California Business, Transportation and Housing Agency’s  
21 Department of Transportation (Caltrans) on Eleventh Amendment Grounds is GRANTED.  
22 Defendants’ motion to dismiss claims for damages against Defendants Bonner, Kempton, and Orso-  
23 Delgado in their official capacities is GRANTED. In all other respects, Defendants’ motion to dismiss  
24 is DENIED.

25 Plaintiff’s motion for preliminary injunction (Doc. # 13) requiring that Defendants reinstate  
26 Plaintiff’s permit for AAH Program segment 11-SD-005 PM 66.3-68.3 N/B and reinstall Plaintiff’s  
27 courtesy signs during the pendency of this litigation is GRANTED. Defendants shall reinstate  
28 Plaintiff’s permit for AAH Program segment 11-SD-005 PM 66.3-68.3 N/B and reinstall Plaintiff’s

1 courtesy signs within thirty (30) days of this Order.

2 **IT IS SO ORDERED.**

3 DATED: June 27, 2008

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5 **WILLIAM Q. HAYES**  
6 United States District Judge  
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